Supreme Court, U.S.
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No. (1) 07-279

In The

Supreme Court of the United States

S.B.D.,

Petitioner,

v.

UTAH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Utah

PETITION FOR A WRIT OF CERTIORARI

SARA PFROMMER
Counsel of Record
for Petitioner
2663 Little Kate Road
P.O. Box 3915
Park City, Utah 84060
(435) 658-2453

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

When fundamental liberty rights are at stake and this Court has determined that due process under the Fourteenth Amendment requires proof by clear and convincing evidence, is a standard of appellate review constitutionally defective if it does not require a determination that the heightened standard of proof was satisfied?

PARTIES TO THE PROCEEDING

S.B.D., Petitioner

State of Utah, through its Division of Child And Family Services

The Guardian ad Litem's Office of the State of Utah

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PETITION FOR A WRIT OF CERTIORARI

S.B.D. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Utah in this case.

OPINIONS BELOW

The decision of the Third District Juvenile Court of the State of Utah is an unpublished opinion dated August 19, 2003. (App. 52-61). The decision by the Utah Court of Appeals, reversing the Juvenile Court's decision appears at *In re Z.D. and A.D.*, 2007 UT App. 261. (App. 36-51). The Utah Supreme Court's decision regarding the standard of review applied by the Court of Appeals appears at *S.B.D. v. State of Utah*, 2006 UT 54. (App. 13-35). The decision of the Court of Appeals, applying the new standard of review that does not consider if the burden of proof of clear and convincing evidence was met and thereupon reinstating the decision of the Juvenile Court appears at *S.B.D. v. State of Utah*, 2007 UT App. 33. (App. 1-12). The Utah Supreme Court denial of the petition for review of the second opinion of the Court of Appeals is dated May 29, 2007. (App. 62).

JURISDICTION

The Supreme Court of Utah denied S.B.D.'s petition for a writ of certiorari by order dated May 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

In *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982), this Court held that the rights of parents in the care, custody and management of their children are fundamental liberty rights, and that due process under Fourteenth Amendment of the United States Constitution requires that the State must support a deprivation of those rights by clear and convincing evidence. This case raises the issue of whether the process by which those fundamental rights have been adjudicated and reviewed by the Utah courts is constitutionally sufficient under *Santosky* and the Fourteenth Amendment.

STATEMENT OF FACTS

S.B.D. is the father of a young son, Z.D. S.B.D. holds a masters degree in social work and was, at the time of the events that led to the prosecution of this case, a social worker for the Division of Child and Family Services in Utah. L.D., his wife, is a stay-at-home mother and was, prior to becoming a parent, a Montessori school teacher. At no time prior to or following the events of this case has there been any indication of any kind of improper behavior on the part of either parent; at trial, witnesses ranging from the family pediatrician to the father's supervisor at the DCFS testified unequivocally about the father's character and their disbelief that either parent could be responsible for either abusing or neglecting their son.

Based on evidence of doctors who had no first-hand knowledge of the child, the family, or the events leading up to the child's injury, the father was found culpable by the juvenile court in Utah of having abusively applied

excessive force to fracture his son's femur. During the pendency of the case, based on the allegations of abuse and the determination that Z.D. and his sister were "at risk," both siblings were removed from the custody of their parents and placed under the custody of the State of Utah.

A State's decision to remove a child from his parent's custody based on allegations of abuse or neglect, which carries with it the potential that parental rights may be terminated, involves individual interests that are "particularly important" and "involve more than mere loss of money." *Santosky* at 756. In *Santosky*, this Court held that the individual rights at stake are so important that the due process rights of the Fourteenth Amendment of the Constitution require that they be protected from interference by the State unless that interference is warranted by clear and convincing evidence.

Santosky sets the state's burden of proof but provides little guidance as to how the standard should be applied by the trial courts or how it should be reviewed on appeal, other than to observe: "consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case." *Santosky* at 764.

In the twenty-five years since *Santosky* was decided, a split has developed regarding the appropriate standard of appellate review of cases in which the burden of proof in the lower court is clear and convincing evidence. Under one approach, the review is limited to the factual sufficiency of the evidence to support a finding of abuse or neglect. In contrast, the second approach requires a less deferential review of the quality of the evidence to determine whether the burden of proof by clear and convincing evidence was satisfied.

Application of these differing standards can lead to unpredictable and varying results from state to state and even from appellate court to appellate court within a state. As set forth below, the Utah Supreme Court has adopted a limited, deferential standard of review, whereas the Texas Supreme Court has determined that only a more rigorous review of evidence in light of the burden of proof will satisfy the due process requirements of the Fourteenth Amendment.

The difference between the two opposing standards is demonstrated by the two decisions of the Utah Court of Appeals in this case. In its first decision, the Court of Appeals applied the more rigorous standard of review and determined that the totality of the evidence did not clearly and convincingly support the juvenile court's conclusion. On remand, the Utah Supreme Court held that it is not the role of the appellate court to reverse a lower court decision "merely because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below," (App. 27, ¶40). Thereafter, the Court of Appeals re-reviewed only the evidence that supported the juvenile court's finding to conclude that the juvenile court's factual finding of abuse was not clearly erroneous. (App. 12, ¶15).

The record in this case shows that on Sunday, November 17, 2002, the father and mother were concerned that their seven-month-old son was having an adverse reaction to a flu shot that he had received in his left leg the previous Friday. They brought their son to the hospital for examination; the hospital intake records documented that the infant was smiling, cheerful, interactive and in no apparent distress. The preliminary examination confirmed no bruising, redness or swelling on the infant's leg or

anywhere else; that is, there were no external signs of a fracture. An x-ray was ordered as part of the examination and only after the x-ray had been processed was a fracture of the infant's left femur revealed and diagnosed.

The hospital has a policy that presumes that all fractures in non-ambulatory infants are caused by abuse. The doctor assigned to the case was neither a radiologist nor an orthopedist, but rather a member of the child abuse investigative team at the hospital. He declared that the "only way" that the injury could have occurred was by slamming the infant's bent knee down on a hard surface like a table or floor. Based on this pronouncement, the juvenile court ordered both Z.D. and his sister removed from the custody of their parents pending trial on the charges of abuse.

At trial, when asked if he was medically certain that the injury was caused by smashing, the doctor testified that he was "51/49" certain of his prior conclusion. Disputing even this marginal degree of certainty, two witnesses for the State, a pediatric orthopedist and a pediatric radiologist, both testified the injury was not caused by "smashing." In addition, two other witnesses called by the father, a pediatric orthopedist and a biomechanical engineer also disputed the initial conclusion as to cause of the injury.

The mother testified about an incident that had occurred several days before the hospital visit, when her mother, the infant's grandmother, accidentally twisted the infant's leg while placing him in a walker, causing him to cry out in pain. The State's witnesses discounted this incident as the cause of the fracture and testified that "any reasonably observant caregiver would have

noticed something wrong with the infant's leg once it was fractured and certainly over the course of the next few days" and "the resulting pain [from the fracture] would have left the baby inconsolable and would have been apparent to Father as Z.D.'s caregiver." The hospital's uncontroverted intake records discredited this testimony, however; they establish that, on the morning following the allegedly abusive injury, the infant was in "no apparent distress" and exhibited no external signs of injury by excessive force.

The juvenile court heard evidence on thirteen different days during a three-month period, after which it concluded that Z.D. was an "abused child" in that he had suffered non-accidental physical harm or negligent treatment under Utah Code Annotated 78-31-103(1)(a)(I) and that Z.D. was a "neglected child" in that he had been subjected to mistreatment or abuse, pursuant to Utah Code Annotated 78-3a-103(1)(s)(i)(B). (App. 60).

The juvenile court, in its "Findings of Fact," concluded that the fractured femur was due to non-accidental trauma and not self-inflicted, and that the explanation provided by the parents was inconsistent with the medical testimony. (App. 53). In the "Court's Commentary," however, the court stated: "Unfortunately, the details of how the child received the femur fracture has [sic] not been provided to the Court but sufficient and clear and convincing evidence has been established for the Court to conclude that it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation." (App. 59).

The father appealed and asked for review of whether the State had met its burden of establishing the nonaccidental trauma by clear and convincing evidence. The Utah Court of Appeals used the following standard of review: " . . . it is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of fact could reasonably conclude that it is more probable that the fact exists than that it does not, . . . but *whether the trier of facts could reasonably conclude that it is highly probable that the fact exists*," citing *Lovett v. Continental Bank & Trust Co.*, 4 UT 2d 76, 286 P.2d 1065, 1068 (1955). (App. 46; emphasis in the original). The court of appeals also observed that it was not required to give factual determinations made by a trial judge the same amount of deference given to factual determinations made by a jury – that is, an appellate court does not, as a matter of course, resolve all conflicts in favor of the appellee, citing *Alta Industries v. Hurst*, 846 P.2d 1282, 1284 n.2 (Utah 1993). (App. 47).

Applying this standard, the Court of Appeals reviewed all of the evidence and reversed the decision of the juvenile court, finding that "the trier of facts could not reasonably conclude that it [was] highly probable that the fracture was the result of nonaccidental trauma inflicted by Father on Saturday afternoon." (App. 50, ¶26). The Court also commented on flaws in the juvenile court's decision-making process, observing that undoubtedly the elongated trial in the case "made it difficult for the trial court judge to recall the evidence and to place it all in context." (App. 37, fn. 1).

The State sought review by the Utah Supreme Court. The Supreme Court reviewed only one issue: "whether the court of appeals applied the correct standard of review

when it reversed a juvenile court determination that Z.D., the seven-month-old son of S.B.D. and L.D., suffered a fractured femur while in S.B.D.'s care and that Z.D. was an abused and neglected child under Utah law." (App. 13-14, ¶1).

The Utah Supreme Court rejected the standard of review used by the Court of Appeals, holding instead that: "[t]he result must be against the clear weight of the evidence *or* leave the appellate court with a firm and definite conviction that a mistake has been made" to reverse the trial court. (App. 27-8, ¶40). With respect to the issue of "clear and convincing" evidence, the Utah Supreme Court suggested that compliance with the burden is optional: "We acknowledge that both burden of proof and identity of the finder of fact *may under appropriate circumstances* affect the degree of deference extended to an appellate court to findings of fact." (App. 22, ¶27; emphasis supplied).

The Utah Supreme Court also rejected the father's contention that whether the evidence is sufficient to meet the heightened burden of proof is a mixed question of fact and law that deserves a careful, independent review and held instead that whether the standard of proof had been met was " . . . one of pure fact" (App. 23, ¶28) that under Utah R. Civ. P. 52(a)[1] must be reviewed deferentially. The Court specifically held: "it is not the role of the appellate court to reverse a trial court merely because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below." (App. 27, ¶40).

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[1] Utah R. Civ. Pro. 52(a) is, in all material respects, identical to Fed. R. Civ. Pro. 52(a).

On remand, the Court of Appeals reviewed only a portion of the record to determine whether there was sufficient evidence to support the juvenile court's decision and did not review the totality of the evidence to determine whether, in light of the entire record, the evidence on which the juvenile court relied was "clear and convincing." (App. 4, ¶7). Following this deferential review, the Court concluded: "If this court were the fact finder, it may have decided the case differently . . . but the cold record on appeal does not reveal the juvenile court's findings to be clearly erroneous." (App. 9, ¶15). By a two to one decision, the Court of Appeals then reversed its original conclusion that the findings were not supported by clear and convincing evidence and reinstated the juvenile court's decision.

The dissent expresses concern with the majority opinion and specifically with the failure to take into account the clear and convincing burden of proof: "After considering both the record and the high standard of proof required at the trial below, I am convinced that the juvenile court mistakenly ruled against Father, and that its findings are clearly erroneous in that they are not supported by clear and convincing evidence." (App. 10-11, ¶19). The dissent also observed that the majority had impermissibly used a presumption of the father's culpability to shift the burden of proof from the State to the father: "The record as a whole reflects that the findings fail to correlate with the uncontradicted testimony from hospital personnel. Therefore, without the presumption against Father, there is insufficient evidence on the record concerning the cause of Z.D.'s injury." (App. 12, ¶22).

The father then asked the Utah Supreme Court to again take the case up on review to consider whether the Court of Appeals had properly reviewed the case, given its

failure to address or analyze the State's burden of proof by clear and convincing evidence and its failure to consider the totality of the evidence, including the evidence that did not support the juvenile court's decision. The Utah Supreme Court declined the father's petition on May 29, 2007. (App. 62).

REASONS FOR GRANTING THE PETITION

Where Fundamental Liberties Are At Stake, Due Process Should Not Differ From State To State; This Court's Intercession Is Required To Reconcile The Diametrically Opposed Positions Of The Supreme Courts Of Utah And Texas On The Issue Of The Proper Standard Of Appellate Review When There Is A Heightened Burden Of Proof By Clear And Convincing Evidence In The Trial Court

Supreme Court Rule 10 sets forth the circumstances in which the Court will grant certiorari. Two of those circumstances are squarely implicated here. As set forth below, the Utah Supreme Court has decided an important federal question in a way that conflicts with another state court of last resort (Rule 10(b)). The Utah Supreme Court has also decided an important question of federal law that has not, but should be, settled by this court, and has decided it in a way that conflicts with relevant decisions of this Court (Rule 10(c)).

This Court's intercession is required to provide a uniform standard of appellate review in important cases where Fourteenth Amendment due process requires proof by clear and convincing evidence. This Court has on previous occasions taken up the issue of the appropriate standard of appellate review where constitutionally

protected liberties are at stake. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657 (1996) (resolving a conflict among the circuits and holding that the ultimate question of reasonable suspicion to stop and probable cause to make a warrantless search should be reviewed *de novo*); *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 436, 121 S.Ct. 1678 (2001) (review of the underlying facts is deferential, but "courts of appeal should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards."). However, this Court has not yet directly addressed the appropriate standard of appellate review when there is a heightened burden of proof at trial.

In this case, the relevant decision of this Court is *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). In *Santosky*, this Court considered the constitutionality of New York law that provided that the state may terminate the rights of a parent in their natural child upon a finding, by "a fair preponderance of the evidence," that the child has been permanently neglected. After reviewing the long history of cases establishing the fundamental nature of parental rights, this Court then concluded that it is "plain beyond the need for multiple citation" that a natural parent's desire for and right to the companionship, care, custody and management of his or her children is an interest far more precious than any property right. *Santosky* at 758-59; *see also, Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208 (1972).

Determining that the interests at stake are "particularly important" and "more substantial than a mere loss of

money," this Court held that "fundamentally fair procedures" require that circumstances justifying interference with those interests must be established by clear and convincing evidence. According to this Court, a "standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence" would lead to an unacceptable risk of an erroneous result. *Santosky* at 764.

The Court also concluded that a "fair preponderance of evidence" standard was an unconstitutional deprivation of the parents' due process rights under the Fourteenth Amendment of the United States Constitution. This principle has been reiterated more recently by this Court in *Troxel v. Granville*, 530 U.S. 57, 64-65, 120 S.Ct. 2054 (2000) ("The liberty interest at issue in this case [the right of a parent to preclude a grandparent's visitation rights] – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

This Court's requirement of a heightened burden of proof is diminished or eliminated, however, unless the standard of appellate review is sufficient to assure that the burden has been satisfied in each and every case. The standard of review established by the Utah Supreme Court does not provide that assurance. Moreover, the fundamental rights at stake should be uniformly protected throughout the country, but Utah's approach is also in direct conflict with Texas, where its Supreme Court has held that a nondeferential review of the sufficiency of the evidence was required to satisfy the constitutional demands of *Santosky* and the Fourteenth Amendment.

A state-initiated hearing to adjudicate abuse or neglect "bears many of the indicia of a criminal trial" and the "State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." *Santosky* at 763. Although the adjudication of abuse or neglect carries many of the indicia of a criminal trial, in Utah an accused parent is not entitled to jury trial; adjudication of the State's allegations is made by a lone juvenile court judge sitting as trier of fact. Even with the heightened standard of proof required by *Santosky*, a parent at risk of losing his child forever has fewer protections than someone accused of a traffic infraction; if the appellate review process does not consider whether that lone judge has held the State to the requisite evidentiary standard, the Fourteenth Amendment protections of that heightened burden are lost.

The Utah Supreme Court provided the Court of Appeals with little guidance as to how it should incorporate the requirement of clear and convincing evidence into its appellate review, but what guidance it did provide substantially devalues the requirement. The Utah Supreme Court has expressly held that analyzing the evidence to determine whether the accuracy of factual finding is "highly probable" or "there is no serious doubt" that the fact exists, is the wrong thing to do. Not only does this decision preclude complete review of whether the evidentiary burden was met, but also it has the unsalutory effect of signaling to the juvenile courts that strict enforcement of the heightened standard is not important.

The identical issue – what standard of review is required when the State is required to produce clear and convincing evidence in support of its allegations of abuse or neglect – has been decided differently by the Texas

Supreme Court in *In re C.H.*, 89 S.W.3d 17 (Tex. 2002). The Texas court noted that while its own prior decision, as well as this Court's decision in *Santosky*, had established a heightened burden of proof for allegations of abuse, neither decision provided any guidance for the conduct of the appellate review. *Id.* at 23.

After reviewing the spectrum of different methodologies that had been employed by the various different appellate courts in Texas, the Texas Supreme Court concluded that the heightened burden of proof at trial must affect how the appellate review is conducted, and that a traditional sufficiency standard is inadequate:

> We hold that the appellate standard for reviewing termination findings is whether the evidence is such that the factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations. That standard best comports with the Supreme Court's holding in *Santosky*, with the definition of clear and convincing evidence we first adopted in Addington, and with the Legislature's definition in the Family Code. * * * Accordingly, we disapprove of holdings that termination findings should be upheld if those findings are not against the great weight and preponderance of the evidence. * * *

89 S.W. 3d 17, 26. [internal citations omitted].

In Texas, unlike in Utah, allegations of abuse or neglect are tried by a jury; even so, the Texas Supreme Court expressly disavowed a "factual sufficiency" standard of the type utilized by the Utah Supreme Court, holding that, in the interest of uniform decision-making, "we reject standards that retain the traditional factual sufficiency

standard while attempting to accommodate the clear-and-convincing burden of proof." *Id.* at 26.

Utah and Texas have thus adopted two diametrically opposed standards of review. Utah holds that a court of appeals may not reverse a lower court decision merely because it determines that the evidence is not clear and convincing, whereas Texas would not only permit, but require reversal under those circumstances. The fundamental liberty interests at stake require, however, that the process to which one is due should not differ from state to state.

The procedural history of this case also reveals a subsidiary, but no less problematic, effect of the lower standard of review adopted by the Utah Supreme Court. Under *Santosky*, it is not the Father's burden to establish that the injury was nonaccidental, it is the State's burden to establish that it was deliberate and abusive by clear and convincing evidence. Whether the father was culpable of deliberately injuring his son should be determined based on evidence, or lack thereof, regarding the nature and cause of the fracture. Only after it has been determined that there is clear and convincing evidence that the injury was nonaccidental should the burden shift and the court look to the sufficiency of any mitigating evidence.

Applying the deferential standard imposed by the Utah Supreme Court, however, the Court of Appeals mistakenly placed the cart before the horse by permitting the sufficiency of the mitigating evidence to influence its review of whether the State had met its *prima facie* burden of proving abuse by clear and convincing evidence. As the dissent observed, this process is nothing more than

burden shifting under the rubric of "common sense." (App. 12, ¶21).

Where due process and fundamental liberty rights are implicated, as they are here, this burden shifting is unconstitutional. As this Court said in *Francis v. Franklin,* 471 U.S. 307, 317 (1985): "A mandatory rebuttable presumption . . . relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous [than an irrebutable one] from the defendant's perspective, *but it is no less unconstitutional.*" (emphasis supplied). *See also, State v. Sorenson,* 758 P.2d 466, 469 (Utah App. 1988); *State v. Chambers*, 709 P.2d 321, 325-26 (1985).

CONCLUSION

Although this case arises in the context of parental rights, it raises a jurisprudential issue that has equal application to any right that has been deemed to be of sufficient importance that only clear and convincing evidence can constitutionally justify state interference therewith. "Retrospective case by case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Santosky* at 757; this sentiment applies with equal effect to a constitutionally defective method of assuring that the evidentiary standard has been met.

This Court's intercession is required to provide a uniform standard of appellate review that assures that the

evidentiary standard required by *Santosky* has, in fact, been observed. This case is an exceptional illustration of the effect of the application of the two diametrically different approaches during appellate review of the same record, making it an exceptional platform for the much needed guidance on this important issue. Please favorably consider this petition for review.

Respectfully submitted,

SARA PFROMMER
Counsel of Record
for Petitioner
2663 Little Kate Road
P.O. Box 3915
Park City, Utah 84060
(435) 658-2453

This opinion is subject to revision before publication in the Pacific Reporter

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of Z.D. and A.D., persons under eighteen years of age.	OPINION (For Official Publication) Case No. 20030750-CA FILED (February 8, 2007) 2007 UT App 33
S.B.D and L.D., Appellants, v. State of Utah, Appellee.	

Third District Juvenile, Salt Lake Department, 169372
The Honorable Olaf A. Johansson

Attorneys: Sara Pfrommer, Park City, for Appellants
Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce and Robert N. Parrish, Salt Lake City, Guardians Ad Litem

Before Judges Bench, Billings, and Thorne.

THORNE, Judge:

¶ 1 We are directed to review this matter a second time in light of the Utah Supreme Court's recent decision in *In re Z.D.*, 2006 UT 54, 147 P.3d 401. We now affirm the judgment of the juvenile court.

BACKGROUND

¶ 2 On November 17, 2002, seven-month-old Z.D. was diagnosed with a broken femur. After an investigation, the State filed a petition with the juvenile court, alleging that Z.D.'s injury was the result of abuse or neglect by his father (Father) while Z.D. was in Father's care on Saturday, November 16. Father denied any wrongdoing and presented an alternate theory alleging that Z.D. was injured on Wednesday, November 13, when his grandmother bent his leg while placing him in a walker. After a lengthy trial and testimony from medical experts on both sides, the juvenile court concluded that Z.D.'s injury was nonaccidental; that it occurred on Saturday, November 16; and that Father was responsible for the injury.

¶ 3 Father appealed to this court, which reversed the juvenile court judgment based on insufficiency of the evidence. *See In re Z.D.*, 2004 UT App 261, 98 P.3d 40 (subsequent history omitted). This court was, in turn, reversed by the Utah Supreme Court on certiorari review. *See In re Z.D.*, 2006 UT 54, 147 P.3d 401. Both of these published decisions contain extensive factual summaries of the proceedings below, and we do not repeat those facts here.

ISSUE AND STANDARD OF REVIEW

¶ 4 The issue in this case is the sufficiency of the evidence to support the juvenile court's factual findings. The Utah Supreme Court has directed us to review the record to determine whether the result is "against the clear weight of the evidence" or leaves us "with a firm and definite conviction that a mistake has been made." *In re Z.D.*, 2006 UT 54 at ¶ 40; *see also* Utah R. Civ. P. 52(a)

("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

ANALYSIS

¶ 5 This court previously reversed the juvenile court in this matter. *See In re Z.D.*, 2004 UT App 261, 98 P.3d 40 (subsequent history omitted). In our 2004 decision, we focused on the clear and convincing standard of proof below and determined that "[t]he evidence does not clearly and convincingly establish that Z.D.'s fracture was caused by an axial load sometime on Saturday when he was in Father's care." *Id.* at ¶ 27. Relying on existing caselaw, we concluded that "we cannot say that, given the evidence presented, 'the trier of facts could reasonably conclude that it [was] highly probable' that the fracture was the result of nonaccidental trauma inflicted by Father on Saturday afternoon." *Id.* at ¶ 26 (alteration in original) (quoting *Lovett v. Cont'l Bank & Trust Co.*, 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955)).

¶ 6 The Utah Supreme Court has now redirected the approach to appellate review of a trial judge's factual findings, stating that "it is not the role of the appellate court to reverse a trial court merely because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below." *In re Z.D.*, 2006 UT 54, ¶ 40, 147 P.3d 401. Instead, "[t]he result must be against the clear weight of the evidence or leave the appellate court with a firm and definite conviction that a mistake has been made." *Id.*

¶ 7 The supreme court also emphasized a duty on the part of appellate courts to review the entire factual record, or at least the portion marshaled by the parties, when evaluating sufficiency of the evidence claims:

> It is . . . the responsibility of the appellate court to provide some indication that it performed its sufficiency of the evidence review in the context of the whole record, or at least that portion of the record to which its attention was drawn by the appellant's marshaling obligation or the appellee's response to the appellant's marshaled evidence.

Id. at ¶ 39. Accordingly, we have reviewed portions of the voluminous record in this case that were identified in the State's brief as bearing on the various fact findings challenged by Father. This review has convinced us that the juvenile court's ultimate factual conclusion that Z.D.'s leg fracture was a nonaccidental injury inflicted by Father on Saturday, November 16, 2002, is not clearly erroneous.[1]

¶ 8 It appears that the crucial determination in this matter is the timing of Z.D.'s injury. If Z.D.'s leg fracture

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[1] This review also raises the possibility that our 2004 decision in this matter should have affirmed the juvenile court based on Father's failure to marshal the evidence in favor of the court's findings. *See State v. Gamblin*, 2000 UT 44, ¶ 17 n. 2, 1 P.3d 1108 ("To successfully challenge a trial court's findings, an appellant must first marshal all the evidence that *supports* the trial court's findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light *most favorable to the trial court's ruling*, the evidence is insufficient to support the trial court's findings." (citation omitted)). However, in light of the supreme court's express direction to address the substance of Father's claims on remand, we believe that it would be inappropriate for us to resolve this case on marshaling at this point.

occurred on Saturday while in Father's exclusive care, it is reasonable to infer that the injury was inflicted by Father and was nonaccidental. These inferences arise from common sense and the other evidence in the record, without reliance on the presumption contained in the former Utah Code section 78-3a-305.1. *See* Utah Code Ann. § 78-3a-305.1 (2002) (repealed 2005) ("In determining whether a minor is an abused or neglected child it may be presumed that the person having the minor under his direct and exclusive care and control at the time of the abuse is responsible for the abuse or neglect."). As pointed out by Justice Wilkins,

> [n]o one suggests that this young child broke his own leg. He was too young to engage in any purposeful activity that presented such a danger. He was injured either by the abuse or neglect of his father, as the juvenile court found, or by the abuse or neglect of someone else into whose care his father or mother had placed him.

In re Z.D., 2006 UT 54 at ¶ 58 (Wilkins, Assoc. C.J., concurring). On the other hand, if the evidence does not establish Saturday as the date of Z.D.'s injury, there is no reason to tie the injury to Father and perhaps less reason to classify the injury as nonaccidental.

¶ 9 The juvenile court found that the injury did occur on Saturday while Z.D. was in his Father's care. This finding is amply supported by the evidence. Despite the painful nature of a fracture such as Z.D.'s,[2] there is nothing in the record indicating that anyone noticed anything wrong with

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[2] Dr. Herman described Z.D.'s fracture as quite severe and testified that it would be very painful.

Z.D.'s leg prior to Saturday. On Friday, Z.D. had received a flu shot in his left leg, the same leg that was ultimately determined to be fractured, yet neither his doctor nor the nurse administering the shot noticed anything amiss. Dr. Bruce Herman, a pediatrician who led the investigation into Z.D.'s injury, was also adamant, and corroborated by two other doctors, that both Father and Z.D.'s mother (Mother) had described Z.D. bearing weight on his legs without distress on Saturday morning. Dr. Herman concluded:

> [W]e've talked numerous times about how symptoms would appear after a fracture and as I say, you can't just take a snapshot of a single moment in time. You have to look more at the trend but it would be my opinion that [Z.D.], after the fracture, would not be doing the normal things that the parents described him [sic] on Saturday morning, bouncing with his legs, pushing with both legs and so it would be my opinion that the fracture occurred after that time, after he was last seen to be using his legs normally.

¶ 10 It is also essentially uncontested that Z.D.'s injury occurred before Mother returned home on Saturday. Both Mother and Father testified that something was wrong with Z.D.'s leg by the time Mother returned Saturday evening, and there is no suggestion of further injury between then and the diagnosis of Z.D.'s fracture the next day. Under these circumstances, we cannot say that the juvenile court's determination that Z.D.'s injury occurred on Saturday while in Father's care is clearly erroneous.

¶ 11 Once the injury is determined to have happened to such a young and nonambulatory child on Father's watch, common sense dictates that Father was either responsible

for the injury or should at least have been able to explain how it occurred. Dr. Herman summarized in his testimony that whatever force caused Z.D.'s fracture "would have been more than a normal daycare activity" and that "the person inflicting or the person causing this fracture would know that they were using even more force than it would be generally required or expected with normal daycare activities." Dr. Herman further elaborated:

> Q: And would a normal, reasonable person having inflicted this injury, know immediately that such an injury had been inflicted?
> A (Dr. Herman): They wouldn't necessarily know that the fracture had been occurred but that there would have been something wrong or that he would have exhibited pain and that he would have exhibited that he was uncomfortable or in pain from that time forward.
> Q: So if in fact it did happen that the father inflicted this injury at some point, there's a high likelihood that he would have known that he'd done that?
> A: Yes ma'am. I'm not saying – at the time this injury occurred, if he was with someone that it occurred with, they would have known that something was wrong, that the forces that had caused that injury were more than the usual daycare activities, daily care activities.

In light of this clear testimony, and assuming that Z.D.'s injury occurred on Saturday, Father's description of an uneventful day is incredible and therefore suspicious.

¶ 12 After reviewing the record, we are no longer troubled by what the supreme court describes as "an abundance of evidence that explains the absence of symptoms" between Wednesday and Saturday morning. *In re Z.D.*,

2006 UT 54, ¶ 42, 147 P.3d 401. Dr. Herman's testimony was quite clear that any reasonably observant caregiver would have noticed something wrong with Z.D.'s leg once it was fractured, and certainly over the course of several days. Even with the evidence of Z.D.'s wrapping and Tylenol use, his lack of symptoms prior to Saturday and his ability to bear weight on both legs on Saturday morning without distress are evidence that the injury did not occur prior to that time.

¶ 13 We also view the axial/lateral issue identified by the supreme court, and argued earlier to this court, as a bit of a red herring. *See id.* at ¶ 43. The axial/lateral distinction was only relevant to the extent that Father's theory of the injury would have required a finding of lateral or leveraged force. However, while a finding of axial force would have discredited Father's theory of Z.D.'s injury, a finding of lateral force would only have been consistent with Father's theory. The same finding of lateral force would also have been consistent with an unreasonable application of leveraged force by Father on Saturday. Thus, even if the juvenile court's determination that the injury was specifically caused by axial force could be deemed clearly erroneous, the determination that Father applied some type of unreasonable and nonaccidental force to Z.D., resulting in his injury on Saturday, remains adequately supported.

¶ 14 Based on the evidence presented to it, the juvenile court determined that Z.D. was injured on Saturday while in Father's care. It made this determination after hearing evidence from which it could easily infer that Z.D. was uninjured as of Saturday morning but injured by Saturday evening. Father, who is the only person with actual knowledge of Saturday's events, provided no nonaccidental

explanation for Z.D.'s injury over this time frame and denied that anything unusual occurred or that Z.D. displayed any sign of injury. Yet there is medical testimony that Z.D.'s fracture resulted from unreasonable force outside the ordinary realm of caregiving, and that the resulting pain would have left Z.D. unconsolable and would have been apparent to Father as Z.D.'s caregiver.

¶ 15 Under these circumstances, the juvenile court's conclusion that Father nonaccidentally injured Z.D. on Saturday is not against the clear weight of the evidence, and we are not convinced that a mistake was made. If this court were the fact finder, it may have decided this case differently, depending on the credibility and demeanor of the witnesses. *See id.* at ¶ 60 (Wilkins, Assoc. C.J., concurring) ("The advantages of being present for the trial, of hearing and seeing all of the participants through the entire proceeding, simply cannot be replicated in the record. No matter how compelling the case made on appeal, it is only a portion of the case seen by the trial judge."). But the cold record on appeal does not reveal the juvenile court's findings to be clearly erroneous. *See State v. Walker,* 743 P.2d 191 (Utah 1987) (Hall, C.J., dissenting) ("[T]he mere fact that on the same evidence this [c]ourt might reach a different result does not justify it in setting aside the trial judge's findings.").

CONCLUSION

¶ 16 Upon further review of this matter as directed by *In re Z.D.,* 2006 UT 54, 147 P.3d 401, we cannot say that the factual findings of the juvenile court are clearly erroneous. Accordingly, we now affirm the judgment below.

William A. Thorne Jr., Judge

¶ 17 I CONCUR:

Judith M. Billings, Judge.

BENCH, Presiding Judge (dissenting):

¶ 18 For the reasons so well expressed in the supreme court's decision, I believe the factual findings of the juvenile court are clearly erroneous. *See In re Z.D.*, 2006 UT 54, ¶¶ 40-44, 147 P.3d 401. I therefore dissent.

¶ 19 Under the clearly erroneous standard, we can set aside the factual findings of a trial court only if the findings " 'are against the clear weight of the evidence, or if [we] otherwise reach[ ] a definite and firm conviction that a mistake has been made.' " *Id.* at ¶ 32 (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). In its opinion reversing our original decision in this case, the supreme court explained that it is "appropriate when evaluating whether a result was 'clearly erroneous' for the reviewing court to consider the standard of proof the prevailing party below was required to meet." *Id.* at ¶ 40; *see also Lovett v. Continental Bank & Trust Co.*, 4 Utah 2d 76, 286 P.2d 1065, 1067-68 (1955) (requiring a "higher degree of proof to sustain a finding of fact which must be established by 'clear and convincing' evidence" than where a mere preponderance is sufficient). After considering both the record and the high standard of proof required at the trial below, I am convinced that the juvenile court mistakenly ruled

against Father, and that its findings are clearly erroneous in that they are not supported by clear and convincing evidence.

¶ 20 In finding that the injury was caused by Father's physical abuse, rather than by the incident involving Z.D.'s baby walker, the juvenile court pointed to Z.D.'s relatively asymptomatic behavior after the walker incident until just prior to the discovery of Z.D.'s broken femur. But the record contains abundant evidence suggesting why Z.D.'s injury could have been difficult to discover earlier. This includes uncontradicted testimony that Z.D. showed no signs of injury when first examined at the hospital; statements from multiple doctors that Z.D. was consolable and had no bruising on the injured leg; testimony that Z.D. was taking painkillers after the baby walker incident for an unrelated ailment; and evidence that Father and Mother routinely swaddled Z.D. in a manner that medical experts testified could have comforted Z.D. despite an injury.

¶ 21 More significantly, there is little evidence, much less clear and convincing evidence, regarding the type and cause of Z.D.'s fracture. The State's medical expert could only testify that he was "51/49" percent certain that the fracture was caused by axial force, and not a type of force consistent with the baby walker theory. The parents' medical expert testified that the absence of bruising and swelling around the injury, the lack of which was noted by multiple doctors, made the State's theory highly unlikely. The juvenile court relied on a statutory presumption, no longer in effect, allowing the court to presume that Father was responsible for any abuse or neglect during the time Z.D. was under Father's direct care. *See* Utah Code Ann. § 78-3a-305.1 (2002) (repealed 2005). Although the supreme

court has directed us to analyze this case without applying the presumption of responsibility against Father, *see In re Z.D.*, 2006 UT 54 at ¶ 44 n. 6, the majority persists in applying that presumption, albeit under the rubric of "common sense."

¶ 22 The record as a whole reflects that the juvenile court's findings fail to correlate with uncontradicted testimony from hospital personnel. Therefore, without the presumption against Father, there is insufficient evidence on the record concerning the cause of Z.D.'s injury. I am convinced that the State failed to prove its allegations of abuse and neglect by clear and convincing evidence and that the juvenile court's findings "are against the clear weight of the evidence." *Id.* at ¶ 32 (quoting *State v. Walker,* 743 P.2d 191, 193 (Utah 1987)). In any event, I am left with a "definite and firm conviction that a mistake has been made." *Id.*

¶ 23 For the foregoing reasons, I would reverse.

Russell W. Bench,
Presiding Judge

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah, in the interest of Z.D. and A.D., persons under eighteen years of age.

No. 20040837

S.B.D. and L.D.,
Respondents,

v.

State of Utah and Guardian ad Litem,
Petitioners.

FILED
September 19, 2006

Third District Juvenile, Salt Lake
The Honorable Olof A. Johansson
No. 169372

Attorneys: Sara Pfrommer, Park City, for respondents
Mark L. Shurtleff, Att'y Gen., John M. Peterson, Asst. Att'y Gen., Salt Lake City, for the State
Robert N. Parrish, Martha Pierce, Salt Lake City, for guardian ad litem

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On Certiorari to the Utah Court of Appeals

NEHRING, Justice:

INTRODUCTION

¶1 We granted certiorari to review whether the court of appeals applied the correct standard of review when it

reversed a juvenile court determination that Z.D., the seven-month-old son of S.B.D. and L.D., suffered a fractured femur while in S.B.D.'s care and that Z.D. was an abused and neglected child under Utah law. We remand this case to the court of appeals for application of the standard of review as discussed below.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On Saturday, November 16, 2002, S.B.D. (father) cared for his infant son Z.D. while his wife, L.D. (mother), was away from the home. Before the mother left the home, she gave Z.D. a dose of Tylenol for an earache, constipation, and teething pains that Z.D. had been experiencing. Later, when Z.D. awoke from a nap, his father observed that he was fussy and guarding his left leg. The father attributed Z.D.'s apparent leg pain to a flu shot that had been administered in Z.D.'s left leg the day before. He wrapped Z.D. tightly in a blanket in what the parents called a "burrito wrap." After being wrapped and held, the symptoms of fussiness subsided.

¶3 That evening, when Z.D.'s mother returned home, she also noticed that Z.D. was favoring his left leg. The parents contacted the Kids Care clinic and were told that there was no need to worry and that Z.D. did not need an examination. That night Z.D. slept normally and evidenced no signs of fussiness or pain.

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[1] The sole issue before us concerns the standard of review adopted by the court of appeals. Our recitation of the facts should not, therefore, be taken to reflect this court's view on the sufficiency of those facts under the standard of review we articulate in this opinion.

¶4 On Sunday morning, the father noted that Z.D. continued to favor his left leg. He took Z.D. to Primary Children's Medical Center (Primary) in Salt Lake City for an examination of the leg. An x-ray revealed that Z.D. had a fractured left femur. The record reflects that Z.D. was in no apparent distress when he was examined, but cried when his leg was manipulated.

¶5 Primary follows certain procedures when a non-ambulatory child is diagnosed with a fracture. First, the hospital admits the child for further examination and treatment – Primary admitted Z.D. to the hospital. Next, it notifies the Division of Child and Family Services (DCFS) for investigation of abuse – Primary did so. However, this case posed complications for DCFS because the father was employed by DCFS as an in-home child welfare investigator. Therefore, DCFS assigned independent investigator Paul Dean to the case. Third, Primary's emergency room staff alerts the hospital's in-house child abuse investigation team, the Center for Safe and Healthy Families (CSHF), to investigate – Primary immediately notified CSHF of Z.D.'s condition.

¶6 Dr. Bruce Herman, a member of the CSHF and a pediatrician, examined Z.D. and concluded that the child likely sustained the fracture on Saturday, November 16, and probably became acutely symptomatic on the same day. Dr. Herman determined that the fracture was most likely the result of excessive axial loading – direct application of force or smashing – of the femur.

¶7 On Tuesday, November 19, 2002, Dr. Herman visited Z.D.'s room while Z.D.'s father, mother, and grandmother were present. The grandmother asked Dr. Herman if it were possible that the fracture took place on Wednesday,

November 13, 2002, when Z.D.'s leg became stuck in a baby walker and she released it by pulling the leg through the hole in the walker. Dr. Herman did not discuss this theory with the family because, according to his testimony at trial, he did not consider it a likely cause of this type of fracture.

¶8 Approximately a month later, the family requested a meeting with Dr. Herman and the members of the CSHF team to further discuss their "walker theory." At this time, the grandmother provided further details about the incident. She said that when Z.D.'s left leg became stuck in the walker his knee was bent. She then placed her left hand and thumbs on that leg just above the knee, pushed, and pulled it through the walker. Z.D. let out a shrill, vigorous cry when this happened but calmed down quickly.

¶9 After the grandmother gave this account and a demonstration of her movements in extricating Z.D. from the walker, a group of physicians from Primary met and agreed that the walker theory and demonstration did not change their opinion that the break was the result of some other type of axial load.

¶10 Kari Cunningham, the hospital liaison to DCFS, testified that the doctors agreed that it was possible for a fracture to occur by use of one's hand on Z.D.'s leg, but that the force used by the grandmother in the walker was insufficient to cause Z.D.'s fracture. According to Ms. Cunningham, the doctors formed this opinion without considering either the Tylenol that Z.D. had been given, his tight wrapping in a blanket, or the reduced level of activity that Z.D. exhibited between Wednesday and Saturday.

¶11 Two additional physicians, Dr. William G. Nixon, a pediatric radiologist, and Dr. John Smith, a pediatric orthopedist, did not participate in the walker demonstration or subsequent meeting, but did propose conflicting opinions. Dr. Nixon had earlier expressed his opinion that the fracture was not made by an axial load, but rather by angular leverage. Dr. Smith explained that he thought the fracture was likely the result of force on the leg over a fulcrum.

¶12 The State then filed a petition pursuant to Utah Code section 78-3a-103(1)(a)(i), alleging that Z.D. was an abused child, that pursuant to Utah Code section 78-3a-103(1)(s)(i)(B), Z.D. was a neglected child subjected to mistreatment or abuse, and that pursuant to Utah Code section 78-3a-103(1)(s)(i)(E), Z.D.'s sister, A.D., was at risk of abuse and neglect because she resided in the same home as Z.D. At trial, both sides offered dueling experts and testimony.

¶13 During trial, the State offered the expert opinions of several physicians, relying principally on the testimony and opinion of Dr. Herman, that Z.D.'s injury was not sustained accidentally. Dr. Herman grounded his opinion concerning causation on three diagnostic observations: the type of Z.D.'s fracture, which provided clues to the mechanism and force associated with the cause of the fracture; the age of the fracture; and the symptoms that were associated with Z.D.'s fracture.

¶14 Based on his observations, Dr. Herman expressed the opinion that the father deliberately fractured Z.D.'s left leg on Saturday, November 16, 2002, by direct and excessive force applied to the bent left knee. Dr. Herman testified this was the only reasonable conclusion

supported by the relevant diagnostic facts. His confidence in his conclusion was not, however, without qualification. While Dr. Herman rejected the walker theory, he conceded that he was "51/49" percent sure that it was direct and excessive force that caused the fracture. He also testified that, while he disagreed with Dr. Nixon's view that Z.D.'s injury was caused by angular force, his disagreement was "not significant."

¶15 Dr. Herman's view that the walker explanation was implausible in his opinion because the femur fracture would have caused Z.D. so much pain that neither the Tylenol nor the "burrito wrap" would have been sufficient to mask Z.D.'s discomfort from a "vigilant caretaker" between the date of the walker incident on November 13 and November 16, the date Dr. Herman believed the father had inflicted the injury. He did not explain Z.D.'s apparent absence of pain when brought to the hospital.

¶16 In their defense, the parents offered the testimony of various experts including Mr. David Ingebretsen, a biomechanical engineer; Debbie Hosseini, a nurse with expertise in premature baby development; and Dr. Steven Scott, a pediatric orthopedic expert.

¶17 Mr. Ingebretsen testified that the walker theory was consistent with his interpretation of the pattern of Z.D.'s fracture. Ms. Hosseini testified that she had often worked with Z.D. and his family because Z.D. was born premature. She testified that she had never seen any bruising or swelling and that Z.D. was a very happy baby who was easily consoled.

¶18 Finally, Dr. Scott testified that he was initially skeptical of the parents' explanation of Z.D.'s injury because in his experience a fracture in a non-ambulatory

infant is generally the result of abuse. However, upon reviewing the medical records, including x-rays, Dr. Scott became persuaded that Z.D.'s fracture was, in fact, caused by the type of lateral force explained by Z.D.'s grandmother. Dr. Scott also testified that the absence of bruising was a significant issue because it is much easier to bruise soft tissue than to break a bone. Finally, Dr. Scott testified that it was not rare for a child to be brought to the hospital days after a fracture because parents may attribute the symptoms to other causes.

¶19 The juvenile court issued findings of fact and conclusions of law. The court acknowledged the difficulty in the case due to its length, complex legal and factual issues, and the emotions of all the parties involved. The court concluded that Z.D.'s leg was fractured on Saturday, November 16, 2002, while he was in the exclusive custody of his father. The court acknowledged that the "details of how the child received the femur fracture has [sic] not been provided to the [c]ourt but sufficient and clear and convincing evidence has been established for the [c]ourt to conclude it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation." The juvenile court determined that it was satisfied that the State had proven each of the allegations of its petition by clear and convincing evidence.

¶20 Z.D.'s parents appealed, claiming that the evidence was insufficient to support the juvenile court's result. The court of appeals reversed. The court of appeals reasoned that "'[w]hile it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive.'" *S.B.D. v. State (In re Z.D.)*, 2004 UT App 261, ¶ 19, 98 P.3d 40 (quoting *Lovett v. Cont'l Bank & Trust Co.*, 4 Utah 2d

76, 286 P.2d 1065, 1068 (1955)). The court went on to detail that

> it is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but *whether the trier of facts could reasonably conclude that it is highly probable that the fact exists.*

Id. (emphasis in original) (internal quotation marks omitted).

¶21 The court of appeals also pared away the deference it afforded the juvenile court findings based on our holding in *Alta Industries v. Hurst,* 846 P.2d 1282, 1284 n. 2 (Utah 1993), that appellate courts do not give factual findings made by a trial judge the same deference as those made by a jury. *Id.* As a result, it explained that "an appellate court does not, as a matter of course, resolve all conflicts in the evidence in favor of the appellee." *Id.*

¶ 22 The court of appeals then put these misunderstood principles of review into practice. It concluded that the evidence, particularly the testimony of Dr. Herman, did not clearly and convincingly demonstrate that the fracture was caused by an axial load, or that it took place on Saturday, when Z.D. was in his father's care. *In re Z.D.,* 2004 UT App 261, ¶ 26, 98 P.3d 40. We granted the State's petition for certiorari to review the standard of review adopted by the court of appeals.

¶ 23 We hold that the court of appeals used the incorrect standard of review and should, on remand, apply the "clearly erroneous" standard discussed below.

ANALYSIS

¶ 24 Appellate courts are removed temporally and geographically from trial courts. They do not see juries impaneled or oaths administered to witnesses. They do not view first-hand witnesses' "tells" of posture, inflection, or mood that strengthen or erode credibility. It is the lot of appellate judges to take their sustenance from the printed page; to peer into the facts as deeply as the flat plane of paper will permit. By the time the trial transcript reaches the hands of the appellate judge, the universal adjective describing its condition is "cold." Thus, appellate courts have ample cause to defer to the judgment of trial judges on matters that cannot be reliably extracted and examined from such a two-dimensional record. The doctrine that shapes and guides judicial review is that it is not within the province of an appellate court to substitute its judgment for that of a front line fact-finder except when exceptional circumstances warrant more rigorous scrutiny.[2]

¶ 25 On this occasion, a unanimous panel of the court of appeals overcame its reluctance to disturb factual findings and reversed a juvenile court judge's determination that the father was responsible for fracturing the left femur of his seven-month-old son Z.D. The court of appeals evaluated the factual record for its sufficiency with the aid

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[2] Examples of circumstances in which we extend less deferential review to findings of fact include our review of challenges to searches and seizures conducted without a warrant, issues of "constitutional fact" implicating First Amendment guarantees, and punitive damage awards, which by their nature carry the risk of infringing due process protections. *Jensen v. Sawyers*, 2005 UT 81, ¶ 61, 130 P.3d 325; *State v. Brake*, 2004 UT 95, 103 P.3d 699; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, 98 P.3d 409.

of a two-part test. *In re Z.D.,* 2004 UT App 261, ¶ 19, 98 P.3d 40. First, the court looked to the burden of proof – clear and convincing evidence in this case – required to sustain the juvenile court's conclusion that Z.D. was an abused and neglected child. *Id.* (citing our opinion in *Lovett v. Cont'l Bank & Trust Co.*, 286 P.2d 1065, 1068 (1955)). The court of appeals concluded that, where the degree of proof required to support a result exceeds a mere preponderance of the evidence, an appellate court may set aside an outcome based on the insufficiency of its factual basis even if one could reasonably conclude that it was more probable than not the fact to be proved existed. *Id.* The court of appeals read *Lovett* to require an appellate court to conduct the more searching inquiry into "*whether the trier of facts could reasonably conclude that it is highly probable that the fact exists.*" *Id.* (emphasis in original) (internal quotation marks omitted).

¶ 26 The court of appeals coupled its view that appellate deference to factual findings was linked to burden of proof with the principle that lesser deference was due factual determinations made by a trial judge than factual findings incorporated within a jury's verdict. *Id.* (citing *Alta Indus. v. Hurst,* 846 P.2d 1282, 1284 n. 2 (Utah 1993)). With these implements, the court of appeals cleared the way to reverse the juvenile court decision.

¶ 27 We acknowledge that both burden of proof and identity of the finder of fact may under appropriate circumstances affect the degree of deference extended by an appellate court to findings of fact. These are, however, tools that are subordinate to the standard of review set out in rule 52(a) of the Utah Rules of Civil Procedure.

¶ 28 Despite attempts by the father to characterize the question under review as a mixed question of law and fact, his challenge to the juvenile court's ruling was one of pure fact: was there sufficient evidence to establish the father's culpability for his son's injury?

¶ 29 An appellate court must launch any review of factual findings from rule 52(a) of the Utah Rules of Civil Procedure and its "clearly erroneous" test, yet rule 52(a) goes unacknowledged by the court of appeals.

¶ 30 The absence of an attempt to explain its reasoning within the context of the "clearly erroneous" standard of rule 52(a) exposed the court of appeals to the charge advanced by the State in its brief that it conducted an appellate trial de novo, affording no deference to the juvenile court's factual findings or to its advantaged position with regard to determining credibility of expert and fact witnesses.

¶ 31 We reiterate the observation made above that the considerations which persuaded the court of appeals that it was justified in examining with more rigor the juvenile court's ruling – a heightened standard of proof and findings made by a judge instead of a jury – are relevant to a sufficiency of the evidence review conducted under rule 52(a). These are, however, subsidiary principles that exist only in the service of an accurate evaluation of whether findings were "clearly erroneous." They cannot be applied independently from a "clearly erroneous" inquiry.

¶ 32 We provided sound guidance to appellate courts regarding the scope of their authority to review factual findings under the clearly erroneous standard of rule 52(a) in *State v. Walker,* 743 P.2d 191 (Utah 1987). There we stated that

> the content of [r]ule 52(a)'s clearly erroneous standard, imported from the federal rule, requires that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.

Id. at 193.

¶ 33 Several interpretative observations may be fairly drawn from the *Walker* commentary on rule 52(a). These include the recognition that it is simply unrealistic to expect an appellate court to conduct a review of a sufficiency of the evidence challenge without weighing evidence. The appellate court must, however, go about weighing the evidence with one eye on the scales and the other fixed firmly on its duty of deference to findings of fact. Thus, it may only disturb findings that offend the "clear weight" of the evidence. An appellate court must be capable of discriminating between discomfort over a trial court's findings of fact – which it must tolerate – and those that require the court's intercession. It must forebear disturbing the "close call."

¶ 34 Judge Richard Posner made an able attempt to give practical meaning to the rule 52(a) standard when he wrote:

> It requires us appellate judges to distinguish between the situation in which we *think* that if we had been the trier of fact we would have decided the case differently and the situation in which we are *firmly convinced* that we would have done so. Our scrutiny of the district judge's findings of fact thus is deferential, but it is not abject. As the

> Supreme Court pointed out in the *Concrete Pipe* case, we need not, to overturn a finding under the clear-error standard, adjudge the finding "so unlikely that no reasonable person would find it to be true."

Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007, 1008 (7th Cir.1994) (emphasis in original) (quoting *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 623 (1993)).

¶ 35 It is the role of subsidiary principles, like the ones employed by the court of appeals here, to help make principled distinctions between a belief that a trial court was mistaken and a firm conviction of error. Thus, an appellate court may consider whether the findings were made by a judge or by a jury. This distinction matters. An appellate court must indulge findings of fact made by a jury that support the verdict. No such indulgence is required of findings made by a judge. We made this point in *Walker* in the context of interpreting rule 52(a) when we looked favorably to the position adopted by Wright & Miller concerning federal rule 52(a) that

> "[i]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed."

Walker, 743 P.2d 191, 193 (quoting Wright & Miller, *Federal Practice and Procedure* § 2585 (1971) (citations omitted)).

¶ 36 The degree of skepticism to which an appellate court subjects a factual record can significantly affect the firmness of a court's conviction that a trial court was mistaken and influence its reading of the scale that weighs those facts. Yet, neither this principle nor any of its associated subsidiary rules of factual review can substitute for rule 52(a) analysis.

¶ 37 It is with some trepidation that we attempt to elaborate further on the dimensions of the *Walker* operational guide to determining what is "clearly erroneous." We will mention, however, two issues of importance that bear on this case: the duty to conduct a review of the "whole record" where a sufficiency challenge is made, and the propriety of considering heightened standards of proof as part of a "clear error" review.

¶ 38 Like rule 52(a) itself, the interpretive tool that we announced in *Walker* was borrowed from federal jurisprudence. *Id.* (citing Wright & Miller, *Federal Practice and Procedure* § 2585 (1971)). *Walker* acknowledged as much when it adopted "the definition of 'clearly erroneous' in the federal rule" as defined in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The *Gypsum* definition explained that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

¶ 39 The *Gypsum* definition, which has lost none of its vitality over the decades, includes the important recognition that the scope of review contemplated by rule

52(a) encompasses the entire factual record.[3] It is, therefore, the responsibility of the appellate court to provide some indication that it performed its sufficiency of the evidence review in the context of the whole record, or at least that portion of the record to which its attention was drawn by the appellant's marshaling obligation or the appellee's response to the appellant's marshaled evidence.

¶ 40 It is also appropriate when evaluating whether a result was "clearly erroneous" for the reviewing court to consider the standard of proof the prevailing party below was required to meet. *See Lovett,* 286 P.2d at 1067. The *Walker* standard requires reversal under rule 52(a) when a result is "against the clear weight of the evidence." *Walker,* 743 P.2d at 193. The amount and quality of evidence required to sustain a result based on a preponderance of evidence is, of course, less than that required to meet a clear and convincing standard. Accordingly, it is more difficult to demonstrate that the evidence supporting a "preponderance" based outcome is so wanting as to be "clearly erroneous" than it is to demonstrate the required dearth of evidence under a more exacting evidentiary standard. Still, it is not the role of the appellate court to reverse a trial court merely because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below. *Walker* demands more. The result must be against the clear weight of the evidence or

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[3] The *Gypsum* language "has become standard fare in subsequent [U.S.] Supreme Court opinions. [Moreover,] [m]ost of the cases in the circuits that define clearly erroneous also routinely follow the *Gypsum* formula." Childress & Davis, *Federal Standards of Review* § 2.05 (3d ed.1999).

leave the appellate court with a firm and definite conviction that a mistake has been made.

¶ 41 We stop short of applying the proper standard to the facts in this case, electing instead to remand the matter to the court of appeals. By finding the standard of review applied by the court of appeals to be flawed, we do not intend to suggest that its result is likewise in error. To the contrary the record as a whole may well leave the court of appeals with a firm conviction that the juvenile court was mistaken in concluding that the State had established each of the allegations of its petition by clear and convincing evidence.

¶ 42 For example, the juvenile court's conclusion that Z.D.'s fractured femur was the result of abuse by his father on Saturday was based primarily on its finding that Z.D. was asymptomatic from Wednesday, the day of the walker incident, until Saturday.[4] But this finding does not account for an abundance of evidence that explains the absence of symptoms, including the painkillers Z.D. had been taking at the time and the "burrito wrap," which stabilized Z.D.'s leg. The finding also leaves unexplained the uncontradicted testimony that Z.D. was in no apparent distress when he was first examined at Primary Children's Hospital. He was described by hospital workers as cheerful, interactive, alert and slightly fussy, but consolable. In fact, the first physician at Primary observed Z.D. independently move his leg. Even after moving Z.D.'s leg

[4] The juvenile court's finding reads: "The [c]ourt is both astonished and dumbfounded why the symptoms would be absent on Wednesday [through Saturday morning], but yet make such a sudden and demonstrative appearance on the afternoon . . . after being in the sole care of the father all day."

around, the physician could not find anything wrong. Far from being the "sudden and demonstrative appearance" of symptoms that "dumbfounded" the juvenile court, the record reveals that Z.D.'s distress was transient and muted.

¶ 43 Moreover, there is scant evidence regarding the causation of Z.D.'s injury. The State's medical expert testified that he was only "51/49" percent certain that the injury was caused by axial force, which was consistent with the State's theory of the case, rather than angular leverage, which was consistent with the parents' explanation of the walker incident. And while the defense's expert admitted the possibility that Z.D.'s injury could have been caused by axial force, he testified that the absence of any bruising, swelling, and contusions surrounding the fracture rendered this mechanism of injury highly unlikely.

¶ 44 Finally, the juvenile court was unable to reach *any* conclusion about what actually caused Z.D.'s injury. Instead, the court relied entirely on Utah Code section 78-3a-305.1, which created a presumption that any abuse or neglect suffered by a minor was caused by the person having the minor "under his direct and exclusive control" at the time of the abuse.[5] Inasmuch as the State presented no evidence of how the abuse occurred, the juvenile court's conclusion that the broken femur was the result of abuse levied by Z.D.'s father, rather than an accidental injury,

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[5] It provided:

> In determining whether a minor is an abused child or neglected child it may be presumed that the person having the minor under his direct and exclusive care and control at the time of the abuse is responsible for the abuse or neglect.

Utah Code Ann. § 78-3a-305.1

was entirely dependent upon this presumption. We note that subsequent to the court of appeals' opinion, the Utah Legislature repealed this presumption. *See* 2005 Utah Laws 1889 (H.B.89).[6] Thus, we ask the court of appeals to determine, under the standard announced today, whether the complete lack of evidence – let alone clear and convincing evidence – regarding the mechanism of Z.D.'s injury, coupled with the juvenile court's failure to account for the evidence that Z.D. was in no apparent distress upon his arrival at Primary, could be a candidate to satisfy the standard of review we announce today supports a reversal of the juvenile court.

CONCLUSION

¶ 45 Because it is beyond the scope of the issue we agreed to take up on certiorari, we decline to comment on whether we believe that the juvenile court's findings and result satisfy rule 52(a). We therefore remand this matter to the court of appeals for the purpose of applying the "clearly erroneous" standard as illustrated in *Walker*.

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[6] As the presumption was simply an evidentiary rule that did not "enlarge, eliminate, or destroy" a substantive right of the parties, its repeal is to be applied retroactively. *Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 39, 104 P.3d 1185. Even when existing procedural rules have been followed at trial, a party whose case has not yet reached final judgment has the right to take advantage of changes in those procedural rules. *See B.A.M. Dev. v. Salt Lake County*, 2006 UT 2, ¶¶ 17-21, 128 P.3d 1161 (applying a procedural statute retroactively to an appeal).

¶ 46 Chief Justice Durham, Justice Durrant, and Justice Parrish concur in Justice Nehring's opinion.

WILKINS, Associate Chief Justice, concurring in the result:

¶ 47 I accept the decision of the majority today that addresses the degree to which appellate judges may substitute their own view of the import of facts for those of the trial judge. I agree that this matter is best referred back to the court of appeals to apply the correct standard to the review of the challenged facts and process. However, I write separately to express my misgivings about the willingness of appellate judges generally to presume that they can reach a sound determination on review of facts presented at trial.

¶ 48 In my view, it is virtually impossible for appellate judges to do anything other than speculate about which facts are susceptible to legitimate challenge and which are not. Despite the urging of my colleagues that cautious review of facts demands consideration of the record as a whole, the whole of the trial experience, as it bears on factual questions, is not available to the appellate judge.

¶ 49 The trial judge sees the witnesses, the parties, and counsel. He or she is able to read the subtle, and not so subtle, human clues to which we attach so much importance in our personal interactions. The trial judge is able to form a thoughtful, experience-based evaluation of these players in the drama of the courtroom. An item of evidence, testimony or otherwise, may only be presented reluctantly, or with a flourish of drama, or entirely by accident. The setting makes a difference to the way we

evaluate the reliability and importance of the content. Bluster and bravado may indicate insincerity, or bluff, or simply bad lawyering with good facts.

¶ 50 The relative competence of counsel plays an important role. Throughout the trial, the experience level, competence, preparation, intelligence, and skill of trial counsel become apparent to the trial judge. They may help or hinder, facilitate or prevent, the presentation of evidence.

¶ 51 The demeanor of witnesses, as has been said so many times by appellate courts, is nearly impossible to perceive from the written record.

¶ 52 It is extremely rare for either the trial judge, or counsel, to enter on the trial record detailed indications of these various and important bits and pieces of human behavior. It is usually enough to say, in findings, that the trial judge does not find the witness or the evidence presented to be believable, and to append a few words indicating the most obvious reason. It is rare to find a thoughtful discourse in the trial transcript detailing the fabric of indicators leading the fact-finder to accept, or not accept, any particular fact or version of fact.

¶ 53 It is for precisely this reason that, historically, appellate judges have pledged their deference to the trial level fact-finders, judges or juries. We are at least honest enough to note that we cannot possibly reach as informed a decision on the factual questions as the trial judge or the jury did. This, however, does not, and has never, prevented appellate judges from substituting their own judgment of the fact question for those of the trial judge.

¶ 54 We are much more reluctant with juries, partly out of respect for the role of the jury and the secrecy of their deliberation process. We cannot know, and dare not ask, on what basis the jury decided. Only when the jury reaches a finding that cannot possibly have come from any of the evidence presented to it do we venture to modify the facts so found.

¶ 55 On the other hand, our behavior toward trial judges suggests a very different attitude. The willingness of appellate judges to second-guess factual determinations by trial judges suggests a sense that we consider ourselves to be their equals (or betters) in every relevant way, including our ability to sort the evidence presented at trial, and to reach more sound, more correct factual determinations. This we do with a nod to the more advantaged position of the trial judge, and to the difficulty of doing a fair and accurate job from reading only the two-dimensional and "cold" trial record. Nonetheless, we do it. And we do it on the basis that we are "convinced" that the trial judge got it wrong. It is of small comfort to me that we limit ourselves to only those times when we are *really* convinced.

¶ 56 This case deals with the severe injury of a very young child. It is a civil proceeding designed by our legislature to protect the child and to assist the family in resolving difficulties that endanger the child. It is not a criminal trial of the accused abuser.

¶ 57 The determination made by the juvenile court in this and similar cases is the basis of jurisdiction, not an adjudication of guilt. Without the finding of abuse or neglect, about which my colleagues express doubt, the juvenile court has no jurisdiction to address the dangers to

which this particular child has been exposed by those charged by law with his protection and nurture. As a court of limited and specified jurisdiction, absent such a finding, the juvenile court can marshal none of the services or protections available to a child in his or her defense.

¶ 58 No one suggests that this young child broke his own leg. He was too young to engage in any purposeful activity that presented such a danger. He was injured either by the abuse or neglect of his father, as the juvenile court found, or by the abuse or neglect of someone else into whose care his father or mother had placed him. When parents do not, or cannot, protect infants from serious physical injury, the legislature has adopted statutory policy requiring the state to step in. The protection from excessive state intervention is the independence, the experience, and the judgment of juvenile court judges statewide.

¶ 59 My colleagues make much of a theory of injury they find inadequately explained by either the state or the trial judge in his formal findings. They overlook the fact that the timing of the injury, and the custodial adult at the time of the injury, are not in factual dispute. They, as our colleagues in the court of appeals before us, simply do not accept the factual theory upon which the trial court acted. This they do, apparently, based upon their own superior evaluation of the evidence presented, and not presented, as disclosed by the record on appeal.

¶ 60 I would reverse the court of appeals on its re-finding of the facts, affirm the factual determinations made by the trial judge, and apply a standard to facts found by trial judges at least as deferential as that applied to juries. Trial judges are selected for, and experienced in,

conducting trials. The advantages of being present for the trial, of hearing and seeing all of the participants through the entire proceeding, simply cannot be replicated in the record. No matter how compelling the case made on appeal, it is only a portion of the case seen by the trial judge. Marshaling the evidence in support of the trial judge's decision is limited to a superficial extract of information contained in the record. Much of importance is not in the record to be marshaled. Consequently, I believe that appellate judges should trust their trial judge colleagues to do their jobs properly, and reserve their correction of factual errors to those few and rare instances when the determination is so clearly wrong that we would reverse not only a trial judge, but also a jury.

This opinion is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of Z.D. and A.D., persons under eighteen years of age.	OPINION (For Official Publication) Case No. 20030750-CA FILED (July 29, 2004) 2007 UT App 261
S.B.D and L.D., Appellants, v. State of Utah, Appellee.	

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Third District Juvenile, Salt Lake Department
The Honorable Olof A. Johansson

Attorneys: Sara Pfrommer, Park City, for Appellants
Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce and Robert N. Parrish, Salt Lake City, Guardians Ad Litem

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Before Judges Billings, Bench, and Thorne.

BENCH, Associate Presiding Judge:

¶1 S.B.D. and L.D. (Father and Mother) challenge the sufficiency of the evidence supporting the juvenile court's determination that Z.D., one of their children, suffered a femur fracture while in Father's care. After receiving

evidence,[1] the court determined that "sufficient and clear and convincing evidence has been established ... to conclude it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation." We reverse.

BACKGROUND

¶2 Father took care of his infant son, Z.D., and two-year-old daughter, A.D., for most of the day on Saturday, November 16, 2002, while Mother was away from the home. Early that morning, before leaving, Mother gave Z.D. a dose of Tylenol for the earache, constipation, and teething that Z.D. had been experiencing in the days prior. He was not given another dose of Tylenol until later that evening. Z.D. took a nap in the afternoon. When Z.D. awoke, he was fussy, and Father noticed that he was favoring his left leg by holding his foot up so that it did not touch Father's lap. Father laid Z.D. in his lap and rubbed the leg because Father thought the flu shot Z.D. had received on Friday, November 15, 2002, was bothering him. Z.D. did not like having his leg rubbed and continued to be fussy. Father wrapped him up tightly in what the parents called a "burrito wrap" and held him. Z.D. stopped being fussy and appeared comfortable. When Mother returned home that evening, she also noticed that Z.D. was favoring his left leg. Mother and Father attributed Z.D.'s favoring of his left leg to the flu shot, but called Kids Care just to be sure. Kids Care reassured them that there was no need to

[1] The trial court received evidence on thirteen different days, spanning the time from March 21, 2003 to June 12, 2003. Undoubtedly, this elongated trial made it difficult for the trial judge to recall the evidence and to place it all in context.

worry, and that Z.D. did not need to be examined. That night Z.D. slept normally and did not display fussiness indicative of pain.

¶3 On Sunday morning, November 17, 2002, when Z.D. continued to favor his left leg, Father took him to Primary Children's Medical Center (Primary) to be examined. The first doctor at Primary to examine Z.D. moved his leg around some, but could not find anything wrong. Another doctor came and placed Z.D. on an examination table. The second doctor pushed Z.D.'s legs up against his torso, straightened and bent his legs, and wiggled and moved them around. Z.D. cried fairly intensely. After Z.D.'s leg was x-rayed, Father was told that Z.D.'s left femur was fractured just above the knee. Z.D. was described by hospital workers as cheerful, interactive, alert, and slightly fussy, but consolable. At some point, Z.D. was examined by Dr. Bridgette Sipher. Sipher noted that Z.D. was in no apparent distress except when his left leg was manipulated. Additionally, there was no bruising anywhere on Z.D.'s body, and no fever, redness, or swelling. Sipher recommended Tylenol or ibuprofen for pain, with Lortab to be considered if necessary. Although there was decreased movement in Z.D.'s left leg, Z.D. was still moving it independently.

¶4 In accordance with Primary's policy to notify the State whenever a fracture is discovered in a nonambulatory child, the emergency room staff immediately notified the Division of Child and Family Services (DCFS).[2] The emergency room staff also notified the Center for Safe and Healthy Families, a group at Primary responsible for

[2] Because of the abuse referral, Z.D. was admitted to the hospital.

identifying and investigating suspected cases of child abuse. Dr. Bruce Herman, a pediatrician and member of the Center for Safe and Healthy Families team, took charge of the investigation and examined Z.D. at Primary the following day, Monday, November 18, 2002. After interviewing Father and Mother, Herman concluded that Z.D. had become acutely symptomatic on Saturday, November 16, which would be consistent with the fracture occurring on that day. He also opined that the mechanism causing the fracture would most likely be excessive axial loading of the femur, and that the parents offered no history providing such a mechanism.

¶5 Because Father was employed by DCFS as an in-home child welfare worker, DCFS retained an independent investigator, Paul Dean, to conduct an investigation of the circumstances surrounding Z.D.'s fracture. Dean first saw Z.D. at Primary. Z.D. was wearing only a diaper, shirt, and fabric splint on his left leg. No marks were visible on Z.D.'s exposed body parts. When Dean interviewed Father and Mother, neither of them could provide an explanation consistent with the mechanism Dr. Herman had described.

¶6 On Tuesday, November 19, 2002, Mother, Father, and Z.D.'s grandparents were at the hospital when Herman stopped by the hospital room. Mother's mother (Grandmother) asked Dr. Herman whether the fracture could have occurred during an incident with a baby walker on the previous Wednesday, November 13, 2002, where Z.D.'s leg became stuck in the walker and Grandmother released his leg by pulling it through the hole of the walker. Herman did not acknowledge the question and, instead, continued to talk. Grandmother asked the same question again. Herman continued to write on his notepad and then left the room. The next day, Grandmother again posed the

walker question to Herman, who then said that the walker incident was not a possible cause of the fracture. He did not follow up on Grandmother's question at that time.[3]

¶7 Later, on December 11, 2003, the family requested a meeting with Herman and other members of the Center for Safe and Healthy Families in order to present the walker incident as a possible mechanism for the fracture. Grandmother gave a demonstration of how she had tried to place Z.D. in his walker, but his left leg became stuck, his knee bent with his foot behind him. In her attempt to extricate his wedged leg, she placed her left hand and thumbs on his left leg above his knee and pushed, and then pulled his foot down through the hole of the walker with her right hand. Z.D. let out a shrill, vigorous cry, but calmed down within fifteen seconds.

¶8 In a separate meeting, after Grandmother demonstrated the walker incident, the Primary doctors met and agreed that their opinions were unchanged by the demonstration. Kari Cunningham, Primary's liaison to DCFS and a child protective services worker with DCFS, was present at the meeting with the doctors. She observed that the doctors agreed that someone could have caused the fracture using their hand, but that the force involved in the walker incident would not have been sufficient to cause the fracture. Cunningham testified that, in discussing the mechanism and forces involved, the doctors did not discuss the medications Z.D. had been taking, the fact that

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[3] During trial, when asked about his response to Grandmother's inquiry, Herman testified that he did not feel that the walker incident would have created the appropriate mechanism, or the appropriate kind of force, to cause the fracture.

he was often placed in a burrito wrap, and Z.D.'s activities in the days between Wednesday and Saturday.

¶9 Dr. G. William Nixon, a pediatric radiologist at Primary, did not participate in this meeting. Nixon had earlier opined that the fracture was not caused by direct axial loading, consistent with Herman's opinion, but rather was caused by angular leverage. Dr. John Smith, a pediatric orthopedist at Primary, was also not present during the walker demonstration on December 11, 2002, but was consulted via telephone. Smith wrote a letter dated December 11, 2002 in which he explained that the fracture could result from the forceful wedging of the leg over a fulcrum (as in the walker incident), but that it would be "difficult to know the degree of force that would be required to produce this fracture by this mechanism."

¶10 At trial, Herman elucidated his position regarding the possible mechanism of the fracture:

> We [the doctors] all agreed that that [the walker incident] would not be the typical mechanism or the one we would usually see to explain that fracture and I certainly have not said that that would have been impossible to be the mechanism. I have that – and it's still my opinion that it was unlikely that that was the mechanism.

In clarifying his view, Herman said that while the walker incident was a *possible* mechanism for the fracture, it was not the *likely* mechanism. As to whether he significantly disagreed with Nixon as to the mechanism of the fracture, he answered, "Significant is a word – I mean we had disagreements about the actual mechanism that could have caused this but would I describe them as significant? No, sir."

¶11 On cross-examination, Dean said it would have been important for him to know whether there was a disagreement among the doctors as to the probable mechanism of the fracture; however, Dean was not made aware of the differing opinions. Dean also testified that he did not know, and did not consider the fact, that Z.D. had been taking Tylenol between the time of the walker incident and when he entered the emergency room on Sunday morning. Nor was Dean aware that Z.D. had been suffering from constipation and an earache, had been teething during that time period, and had received a flu shot on Friday. Dean admitted that all of these factors would have been important for him to know.

¶12 In his testimony, Herman identified three factors to be considered in investigating Z.D.'s fracture: 1) the type of fracture, which helps to determine the mechanism and force; 2) the age of the fracture; and 3) the symptoms associated with the fracture. He explained that, taken together, these factors demonstrated that Z.D.'s femur fracture was the result of nonaccidental trauma inflicted on Saturday, November 16, rather than the walker incident on Wednesday, November 13.

¶13 As to mechanism, Herman testified that he was "51/49" percent certain that the fracture was caused by a significant axial force applied to a bent knee. As to the force, Herman thought it unlikely that the walker could generate the forces required to fracture the femur. As to the age of the fracture, both Wednesday (the date of the walker incident) and Saturday (the date Herman noted Z.D. manifested symptoms), fit within the time period identified as when the fracture could have occurred. As to the type and timing of symptoms, Herman thought that if the walker incident had been the cause of the fracture,

then Mother and Father would have noticed symptoms of a broken leg prior to Saturday. Herman maintained that symptoms of a broken leg would have been apparent, especially when Z.D.'s leg was moved during daily activities like diaper changes and clothing changes. Regardless of Z.D.'s teething, earache, constipation, taking of Tylenol, absence of external injuries, and the fact that he was often tightly swaddled in a burrito wrap, which mimicked a splint, Herman doubted that the symptoms of a broken leg could be hidden from a vigilant caretaker from Wednesday to Saturday.

¶14 Mother and Father called a number of witnesses. David Ingebretsen, an expert in the field of bio-mechanical engineering, testified that the fracture pattern was consistent with the forces identified by the walker incident. Debbie Hosseini, a registered nurse who works with the early intervention program helping premature babies with their development, had come to Z.D.'s home every month to observe him. She testified that he was a very happy baby, always smiling, and very easy to console. She never saw any bruising or swelling on Z.D.

¶15 Finally, Dr. Steven Scott, an expert in pediatric orthopedics, gave extensive testimony. Scott testified that the femur fracture did not follow the typical pattern of nonaccidental trauma, and he disagreed with Herman as to the probable mechanism. After examining the fracture pattern, and feeling that it did not fit the typical pattern that is normally seen with nonaccidental trauma, he wanted to know if there was an explanation for the fracture that fit the fracture pattern. Scott believed that the fracture pattern required a marriage of two forces in the same mechanism. He thought that Grandmother's walker demonstration "mimicked the forces exactly that would be

needed to produce the fracture pattern." As to the force, he testified that there is no real way to know how much force is required to break a bone on a particular person, but the walker incident created a leverage force, and leverage forces create great force when little force is applied. Additionally, the area of the bone where the fracture occurred was a weaker area of the femur, and Z.D.'s delayed bone age gave him a weaker bone because it had less mass and was composed of immature woven bone, making it structurally weak.

¶16 In discussing the symptoms of a fracture, Scott agreed with Herman that bone pain is typically worse with any kind of manipulation or movement, but thought that in a child of Z.D.'s age, symptoms would be more generalized fussiness, irritability, crying, and lack of movement of his leg. He also explained that wrapping Z.D. in a burrito wrap would influence a caretaker's ability to detect symptoms because swaddling is exactly what happens when a child has a splint. Scott's opinion as to the onset of symptoms was also different from Herman's. Scott did not find it remarkable for three days to elapse before Mother and Father noticed symptoms of the fracture. As examples, Scott said that in the eighteen years he had been involved in taking care of children's fractures, it was not uncommon to see even a verbal child brought in two or three days after the injury because the parents attributed the symptoms to something else. He had also seen nonverbal children who had fractures for days, or even more than a week, before caretakers (or medical professionals) realized there was a problem that required medical attention. Scott pointed to the numerous physicians who examined Z.D. at Primary and described him as cheerful, interactive, alert, and fussy, but consolable. At the hospital, Z.D. presented

neither localized nor generalized symptoms. Further, at least six physical examinations of Z.D. specifically noted that there were no skin lesions, bruises, lacerations, abrasions, burns, or scars. Scott concluded that if the mechanism that caused the fracture were a direct force, as Herman believed it to be, then he would expect bruising around the leg because the force it takes to bruise soft tissues is less than the force it takes to break a bone. On the other hand, with the walker incident, the amount of force needed to be applied to the skin in order for the femur to fracture, is well below the amount required to bruise the skin. He also cited a study where over ninety percent of the children with suspected nonaccidental fractures also had soft tissue injuries.

¶17 After receiving all of the evidence, the juvenile court found that Herman "unequivocally testified that the femur fracture was the result of non-accidental trauma, and would have required significant and excessive force to cause such a complex femur fracture." The court was convinced that the fracture occurred on Saturday when Z.D. was in Father's care because the court was both "astonished and dumbfounded" as to why the symptoms would be absent on Wednesday, Thursday, Friday, and on Saturday morning, "but yet make such a sudden and demonstrative appearance on the afternoon of the same day."

¶18 The court concluded that Z.D. was abused and neglected while in Father's care, and that A.D. was a neglected child as a result of being in the same home as Z.D. *See* Utah Code Ann. § 78-3a-103(1)(s)(i)(E) (2002). Z.D. and A.D. were removed from the home. The court

ordered DCFS to submit a reunification service plan.[4] Father and Mother appeal the trial court's adjudication.

ISSUE AND STANDARD OF REVIEW

¶19 Father argues that the juvenile court erred in finding that the State established abuse by clear and convincing evidence. *See* Utah R. Juv. P. 41(b). The standard for assessing whether evidence is "clear and convincing" has been articulated as follows:

> While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule. . . . In such cases it is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but *whether the trier of facts could reasonably conclude that it is highly probable that the fact exists.*

Lovett v. Continental Bank & Trust Co., 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955) (quotations and citations omitted) (emphasis added). "An appellate court does not give factual determinations made by a trial judge the same amount of deference given to factual determinations made by a jury – that is, an appellate court does not, as a matter

[4] Father and Mother successfully completed their service plan. DCFS involvement was eventually terminated, and the children were returned to the custody of Father and Mother without condition.

of course, resolve all conflicts in the evidence in favor of the appellee." *Alta Indus. v. Hurst,* 846 P.2d 1282, 1284 n.2 (Utah 1993) (citations omitted).

ANALYSIS

I. Type of Fracture

¶20 Even disregarding the testimony of defense witnesses Ingebretsen and Scott, who both testified that the fracture pattern was consistent with the forces identified by the walker incident, the remaining evidence presented varying opinions as to the probable mechanism.[5] Contrary to the court's finding, Herman's testimony was anything but "unequivocal." He testified that he could only be "51/49" percent certain that the fracture was caused by a significant axial force applied to a bent knee. This testimony, standing alone, is far from clear and convincing. Further, neither one of the State's own witnesses – Smith and Nixon – bolstered the opinion of Herman. Although Smith refrained from estimating the degree of force required, he thought the fracture could have resulted from

[5] Scott agreed that an axial load could cause such a fracture. He described two possible scenarios: 1) the child stands with locked knees and is then slammed down or dropped, so that the force passes through the feet and into the knee and femur; and 2) the child experiences a blow to the end of the knee, directly over the kneecap. He explained that the first instance was unlikely because Z.D., as a nonambulatory child, did not have the muscle tone to stand and lock his knees. Additionally, the fracture pattern did not match that scenario. The second instance was unlikely because a direct blow strong enough to fracture a bone should leave a contusion, swelling, or welt over the kneecap. Again, the fracture pattern was not consistent with such a mechanism.

the walker incident. Nixon thought the probable cause of the fracture was angular leverage.

¶21 As explained by both Scott and Ingebretsen, and uncontested by any of the State's witnesses, if the mechanism causing the fracture is assumed to be the result of an axial load, then more force would be required to cause the fracture than would be required by the leverage force created by the walker incident. None of the expert witnesses could provide an opinion as to how much force would be required to cause the fracture with either an axial load or the walker incident.

II. Age of Fracture

¶22 Both Wednesday and Saturday fall within the time period identified by the experts as to when the fracture likely occurred; thus, this factor does not help to establish that the fracture occurred on Saturday.

III. Symptoms Associated with Fracture

¶23 There was a great deal of conflicting evidence associated with the type and timing of symptoms. The court was "both astonished and dumbfounded" as to why the symptoms would be absent on Wednesday, Thursday, Friday, and Saturday morning, and "yet make such a sudden and demonstrative appearance on the afternoon of the same day." Yet, the court also recognized that Father saw very little of Z.D. on Wednesday, Thursday, and Friday, so that when the symptoms seemed to Father to "suddenly appear" on Saturday, Father had no way of comparing the symptoms exhibited on Saturday with the symptoms exhibited in the days prior. Further, the court did not acknowledge that Mother had given Z.D. regular

doses of Tylenol on Wednesday, Thursday, and Friday, with the last dose being given at approximately 4:00-5:00 a.m. on Saturday. Even then, the court was not persuaded that "minimal doses of minor pain killers" could mask Z.D.'s symptoms. Yet, the State's witness, Sipher, testified that Tylenol may very well influence whether a caretaker is able to detect symptoms of an injury. Herman testified that children with fractures are prescribed something stronger than Tylenol or ibuprofen for pain, and he was surprised to find that the emergency department had initially given Z.D. only Tylenol after discovering the fracture.

¶24 The court found that "[m]edical experts testified and generally agreed that the pain and the symptoms attendant to the leg fracture would be significant and that the fracture would be extremely painful"; further, that the symptoms would be "readily detectable and observable by a caretaker." Yet the court made no mention of Sipher's testimony that it would not be surprising for the caretakers to attribute Z.D.'s fussiness to teething. Defense witness, Scott, testified that, in his eighteen years of treating children's fractures, it was not uncommon for nonverbal children, in the charge of medical professionals, to go for days, or even a week, after sustaining a fracture before receiving treatment because the medical professionals did not realize that a fracture had occurred. The court found that Father described Z.D.'s symptoms as significant, and that the hospital physicians and other doctors confirmed this description. Yet, Scott pointed to the medical reports from Primary itself, wherein Z.D. was described as cheerful, interactive, alert, and fussy, but consolable. Even when the first doctor at Primary examined Z.D. and moved his leg, he could not find anything wrong.

¶25 Perhaps the most significant symptom was the one not present. Noticeably removed from the court's findings and the State's case entirely, is any mention of, or explanation for, the absence of external injuries. Z.D. sustained no lesions, welts, bruising, swelling, redness, burns, abrasions, lacerations, or scars. If the fracture were caused by an axial load, the mechanism believed by some State witnesses to be the probable cause, it would almost always be accompanied by a soft tissue injury like bruising or swelling.

¶26 Because the "explanations as to the cause of the injury provided by the parents [was] inconsistent with the medical testimony," the court determined that clear and convincing evidence had established that the fracture occurred on Saturday afternoon while Z.D. was in Father's care. However, we cannot say that, given the evidence presented, "the trier of facts could reasonably conclude that it [was] highly probable" that the fracture was the result of nonaccidental trauma inflicted by Father on Saturday afternoon. *Lovett v. Continental Bank & Trust Co.*, 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955).

CONCLUSION

¶27 The evidence does not clearly and convincingly establish that Z.D.'s fracture was caused by an axial load sometime on Saturday when he was in Father's care.

¶28 We therefore reverse.

/s/ Russell W. Bench
Russell W. Bench,
Associate Presiding Judge

¶29 WE CONCUR:

/s/ Judith M. Billings
Judith M. Billings,
Presiding Judge

/s/ William A. Thorne
William A. Thorne Jr., Judge

In the Third District Juvenile Court
Salt Lake County, State of Utah

State of Utah, interest of Dunsmore, Alexis 9-19-2000 Dunsmore, Zachary 4-6-2002 Persons under eighteen years	Findings of Fact, Conclusions of Law, and Decree (Filed Aug. 19, 2003) Case Nos. 169373, 169372

The above matter came before this Court for trial on 3-21, 3-24, 4-21, 5-1, 5-2, 5-6, 5-8, 5-12, 5-19, 5-21, 5-27, 6-11, and 6-12 of 2003, pursuant to the State's Verified Petition filed 11-22-2002. The State was represented by Amy Jackson, Assistant Attorney General; the Office of Guardian ad Litem was represented by Robert Parrish, attorney at law; the mother, Lisa Dunsmore, was present and represented by Ronald Wilkinson, attorney at law; the father, Stephen Dunsmore, a.k.a. Brig Dunsmore, was present and represented by Blake Nakamura, attorney at law.

Having now considered the testimony of witnesses, reviewed the numerous exhibits, and listened to arguments of counsel, and/or, read the closing arguments submitted at counsel's option, the Court finds and concludes that the State has proven its Verified Petition of 11-22-2002 by clear and convincing evidence in the following particulars, and makes the following

Findings of Fact:

1. That the parents of the above named children are Stephen, a.k.a. Brig, and Lisa Dunsmore, who reside in West Jordan, Utah;

2. That on or about 11-17-2002, Zachary, a seven (7) month old, non-ambulatory child, was admitted to the Primary Children's Medical Center suffering from a fractured femur;

3. The fractured femur was due to non-accidental trauma and not self-inflicted;

4. The femur fracture suffered by the child occurred at a time when he was under the direct and exclusive care and control of his father, Stephen, a.k.a. Brig, Dunsmore;

5. The explanations as to the cause of the injury provided by the parents is inconsistent with the medical testimony;

6. Initial skeletal surveys taken upon the child's admission to the hospital, also revealed a possible skull fracture to the child's head. Subsequent additional tests were performed on the child's skull to definitively answer if there was a skull fracture, but the medical experts could not reach a consensus on the issue. However, from the evidence presented, the Court is convinced there was a skull fracture, and not an associated suture as the parents aver. Nonetheless, neither the source nor the cause of the skull fracture is known or suggested, and it has not been established whether it was accidental or non-accidental in nature. Neither has it been established in whose care and control the child was under when the alleged skull fracture occurred nor when it may have occurred. These issues are all problematic and, therefore, the Court finds the evidence is inconclusive and insufficient to conclude that the skull fracture was the result of neglect or abuse by either parent.

Court's Commentary:

This has been a most difficult case, not only because of its length, but because of the complex factual and legal issues presented. The Court is not insensitive to the emotions of all parties involved in the trial of this matter. The Court ascribes no ill-will toward either parent in making its findings. The issue at trial has never been about the character of the parents nor about their love for their children. The Court senses the love the parents have for their children. Rather, the facts dictate the Court's findings and conclusions.

Through a rather protracted proceeding, the Court has been handed a State's case built primarily on medical, communicative, and circumstantial evidence. The parents' cases are also built around medical testimony coupled with an explanation as to the instrumentality involved, what the parents said and did, but also on circumstantial evidence. Not surprisingly in this type of case, there has been no testimony from any eyewitnesses who allegedly observed how the leg injury occurred. Rather, the Court is left with attempts to reconstruct what happened from medical experts, and from testimony by persons close to the events as they developed.

The parents claim neither any personal knowledge nor provide any explanation as to the source of the injury. However, the grandmother recalls the child's leg getting caught in an infant "walker" on Wednesday, 11-13-2002. As she attempted to place the child into the "walker", the child let out a shrill cry. In her efforts to extract the child's leg from the "walker", she asserts that she must have caused the femur to fracture during that event. She demonstrated to medical staff and in the court setting how

she must have accidentally or inadverdently caused the fracture to the leg. Hers is the only explanation provided the Court as to the source of the fractured femur from any of the parites.

Medical experts testified and generally agreed that the pain and the symptoms attendant to the leg fracture would be significant and that the fracture would be extrememely painful to the child. According to the medical testimony, symptoms of fussiness, irritability, sensitivity to touch, inability to bear weight on the injured leg, crying, and general discomfort would all be expected to be present from the moment of initial infliction of the injury, and would persist in greater or lesser degree depending upon the type of activity exerted on the child. Daily changing of diapers, clothing, bathing, handling of child for naps, being held by parent or others, being transported in a car, being placed in and out of a car seat, etc., are all routine activities which would be noticably affected by the child's response to the pain of the injury, and are readily detectable and observable by a caretaker.

From Wednesday, 11-13, to Saturday, 11-16, neither the mother nor the grandmother noticed any unusual, or out-of-the ordinary, stress, pain or discomfort to the child. The grandmother described the child as being comforted by her within three (3) to five (5) seconds after the shrill cry, and he appeared fine for the rest of the day. He remained in the "walker" and she noticed no swelling or pain in his leg. She testified she checked his leg and observed nothing out of the ordinary and she stated he exhibited no discomfort. She said the child was handled in and out of a car seat without distress. To her, everything seemed normal with the child.

The mother testified the child exhibited no more than usual or ordinary fussiness on Thursday, 11-14, or Friday, 11-15, although the child did have flu shots on Friday. Even on the morning of Saturday, 1-16, she fed the child, played and talked with him, even placed him in the "walker" and removed him again when he got fussy, and placed him on the floor in a "burrito" wrap (a word used to describe the method of firmly wrapping a blanket around an infant). She stated he appeared normal and fine when she went shopping with her mom (grandmother), and left him in the care of his father, Steve or Brig, Dunsmore. While shopping, she called home about three (3) times to check on the child, and nothing out of the ordinary was reported by the father. When she arrived home in the evening about six p.m., or shortly thereafter, the child was on the floor on a blanket. She picked him up, interacted with him, and held him on her lap. She noticed his left leg appeared a bit bent, so she rubbed it thinking it was due to the flu shot. It was then she noticed he did not want to stand on his left leg. As his symptoms worsened, the father took him to Primary Children's Medical Center for examination on Sunday, 11-17. Subsequently, the child was admitted to the hospital with a fractured femur.

The Court has received testimony from numerous doctors, family members, and others. Where permitted or allowed, each has rendered an opinion. Many of the expert witnesses were called in after the fact, so to speak, to assist in possibly explaining what could have happened, and what the possible instrumentality may have been which caused the leg injury.

The chief attending physician on duty at the time of the admission of the child, unequivocally testified that the femur fracture was the result of non-accidental trauma,

and would have required significant and excessive force to cause such a complex femur fracture. The same attending physician observed the demonstration by the grandmother of the "walker" as the possible instrument and he medically discounted it as the source of injury. His opinion was supported by several other physicians, all experienced and trained in diagnosing and treating cases of suspected child abuse, or non-accidental trauma. Several of these doctors currently serve on the child abuse protection team at the Primary Children's Medical Center.

Assuming for the sake of argument that the source of the injury was the "walker", then one has to assume it (the injury) occurred on Wednesday, 11-13-2002, as described by the grandmother, and as asserted by both parents. The father describes symptoms as suddenly appearing in the afternoon of Saturday, 11-16. The father testified he saw little of the child on either Wednesday, 11-13, or Thursday, 11-14, or Friday, 11-15, because he got home from work after the child had been put to bed for the night. As described by the father, and confirmed by the hospital physicians and other doctors, the attendant symptoms of the leg fracture were significant, and the doctors testified that the symptoms would be present from the initial receipt of the injury on Wednesday, and persist on Thursday, Friday, and Saturday until hospitalization, which occurred on Sunday, 11-17. However, the testimony from the mother and grandmother, the two persons who almost exclusively spent Wednesday, Thursday, and Friday with the child, does not reveal any observations of the expected symptoms in the child. Not even on Saturday morning was there a mention of concern for the child's behavior or any symptoms out of the ordinary. Those symptoms were first noticed by the mother on Saturday evening upon her

return home from shopping when she interacted with the child. It was then she realized he favored his left leg and would not bear weight on it.

The Court is both astonished and dumbfounded why the symptoms would be absent on Wednesday, 11-13, Thursday, 11-14, Friday, 11-15, and on Saturday morning of the 16th, but yet make such a sudden and demonstrative appearance on the afternoon of the same day, Saturday, 11-16, after being in the sole care of the father all day.

The parents assert that any number of drugs, among them Tylenol and Ibuprofen, may have masked the symptoms. However, the Court is not persuaded that the minimal doses of minor pain killers as mentioned in the testimony would mask the symptoms attendant to the child's femur fracture. Additionally, it is asserted, by the mother particularly, that she used extreme caution and care in her handling of the child while bathing him, changing his diapers, changing is clothes, etc., thus perhaps masking any symptoms the child may otherwise have exhibited such that they could not be readily detected by either parent. Further, they assert that even the administration of the flu shots to his leg must have been done with such great care as to mask any possible detection by medical personnel, a nurse and a doctor, of symptoms from the supposed Wednesday fracture. To this Court, that is inconceivable and not believable.

If the "walker" was the source and instrumentality of the leg fracture then, according to medical testimony, the symptoms attendant with such injury would have been present on Wednesday, Thursday, Friday, and on Saturday morning as they were on Saturday evening, or late afternoon that day. As well-intended as the grandmother's

explanation may be, the Court discounts her story as the source of the leg fracture.

The Court is convinced that the leg fracture occurred on Saturday, 11-16, during the time he was in his father's care. Unfortunately, the details of how the child received the femur fracture has not been provided to the Court but sufficient and clear and convincing evidence has been established for the Court to conclude it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation.

UCA 78-3a-305.1, provides:

"In determining whether a minor is an abused child or neglected child it may be presumed that the person having the minor under his direct and exclusive care and control at the time of the abuse is responsible for the abuse or neglect." See State ex rel L.M. v. State, 2001 UT App. 314, 37 P.3d 1188.

This presumption is rebuttable, but the Court finds that the father has failed to rebut it. Having rejected the grandmother's explanation that the incident which broke the child's leg occurred on Wednesday, 11-13, via the "walker", the legal presumption applies to the father as he had the child " . . . under his direct and exclusive care and control at the time of the abuse . . . " , and is therefore legally responsible for the abuse and/or neglect.

As to the skull line discovered on x-rays taken of the child, the Court is convinced that it is the result of a fracture and not an associated suture. The Court is persuaded by Dr. Nikon's years of experience in the field and finds his testimony and opinion believable and more credible than the other experts who testified. In any event,

the Court has already concluded the evidence is not clear and convincing that the skull fracture was non-accidental in nature.

Wherefore, based upon the foregoing Findings of Fact, the Court enters the following

Conclusions of law:

1. That said child, Zachary, is an "abused child" in that he has suffered non-accidental physical harm, or negligent treatment, pursuant to UCA 78-3a-103(1)(a)(I);

2. That said child, Zachary, is a neglected child in that he has been subjected to mistreatment or abuse, pursuant to UCA 78-3a-103(1)(s)(i)(B);

3. That said child, Alexis, is a neglected child in that she is at risk of being a neglected or abused child because another child in the same home is a neglected or abused child, pursuant to UCA 78-3a-(1)(s)(i)(E).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following

Decree:

1. That this matter is set for a dispositional hearing on September 10, 2003 @ 11:15 AM, before Judge Nolan, at the Sandy Courthouse, 210 West 10000 South, Sandy, Utah;

2. That the Division of Child and Family Services is directed to submit a written reunification service plan for both parents for the Court's consideration, and that copies

be provided to Court and counsel five (5) days prior to the hearing date scheduled above;

3. That previously conducted psychological evaluations of both parents be made available for the Court's consideration at the dispositional hearing;

4. Previous orders regarding custody, guardianship, and visitation shall remain as ordered pending further review and order of the Court.

Dated this 15th day of August, 2003.

[SEAL]

/s/ Olof A. Johansson
Olof A. Johansson Judge

cc: Blake Nakamura, attorney at law
Ron Wilkinson, attorney at law
Stephen and Lisa Dunsmore, parents
Amy Jackson, Office of Attorney General
Rob Parrish, Office of Guardian ad Litem
Division of Child and Family Services

IN THE SUPREME COURT OF STATE OF UTAH

–ooOoo–

State of Utah, in the interest of Z.D. and A.D., persons under eighteen years of age

S.B.D.,

Petitioner,

v.

State of Utah,

Respondent.

Case No. 20070196-SC
20030750-CA

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ORDER

(Filed May 30, 2007)

This matter is before the court upon a Petition for Writ of Certiorari, filed on March 6, 2007.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For The Court:

Dated May 29, 2007

/s/ Christine M. Durham
Christine M. Durham
Chief Justice